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April 12, 2007

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ERRATUM
Docket No. 02-6
Consolidated Request for Review
Trillion Partners, Inc.

Dear Ms. Dortch:

Due to an inadvertent oversight, the incorrect SLD file numbers were listed on the cover page and page 1 of Trillion Partners, Inc.'s ("Trillion") Consolidated Request for Review. Attached hereto is a corrected copy of Trillion's Consolidated Request for Review.

Respectfully submitted,



Carly T. Didden

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of

Consolidated Request for Review of Decisions of the Universal Service Administrator

The School for Integrated Academics and Technologies, Inc. (“SIATech”)

New Education for the Workplace, Inc.
("NEWCorp")

CC Docket No. 02-6

File No. SLD-536126(FY2006)

File No. SLD-536824, SLD-537090,
SLD-537176, SLD-537265 (FY2006)

CONSOLIDATED REQUEST FOR REVIEW

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March 29, 2007

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SUMMARY

This is a case of a simple mistake made by a dedicated public charter high school employee who is new to the complex requirements of the E-rate Program. The central question in this appeal is whether this employee, the IT Director, signed certain contracts on February 16, 2006, thereby satisfying the FCC's mandatory 28-day posting period. As discussed below, the overwhelming contemporaneous evidence proves that the IT Director signed the contracts on February 16.

On February 16, 2006, SIATech's and NEWCorp's IT Director received two copies of five contracts executed by Trillion. He signed one set and gave it to his Administrative Director, who forwarded it to Trillion. This is the official set of contracts, all of which are dated February 16, 2006. However, the IT Director mistakenly hand-dated his copy set as February 15, 2006, **and** kept it in his files. This is the set of contracts that he forwarded to the Program Integrity Assurance ("PIA") reviewer at **USAC**. Therefore, USAC denied the applications on the grounds that contracts were signed on the day of expiration of the 28-day posting period, February 15, 2006.

Through this appeal, Trillion presents, among other things, **an** e-mail that demonstrates that the official set of contracts, dated February 16, 2006, existed at all times relevant to the applications at issue. Thus, Trillion respectfully requests that the Commission conduct a *de novo* review of USAC's denials and make a formal determination that the Schools did not violate Section 54.504(b)(4) of the Commission's rules, the 28-day posting period, because the attached evidence proves to the contrary. Specifically, the contemporaneous evidence shows that the Schools and Trillion executed legally binding contracts on the allowable contract date of

¹ 47 C.F.R. § 54.504(b)(4).

February 16,2006 and that (1) USAC’s denials are based on a clerical error; (2) under Texas law, even the erroneous duplicate contracts are considered to be executed on February 16,2006; and (3) there is no harm to the competitive bidding process that requires fair and open competition because the parties satisfied the 28-day posting period, and there was only one bidder.

In the alternative, if the Commission decides that the additional information presented in this appeal is too late, Trillion requests a limited waiver of USAC’s Appeals Guidelines to allow the additional information on appeal. We respectfully request the Commission to grant this limited waiver because the particular facts in this case make strict compliance inconsistent with the statute and public interest of providing these needy and deserving charter schools with Internet access? In addition, there is no evidence of waste, fraud, abuse, or failure to adhere to core program requirements, and there has been no harm to the competitive bidding process.

² Specifically, section 254 directs the Commission to “enhance. . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries.” *See* 47 U.S.C. § 254(h).

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Consolidated Request for Review of)	CC Docket No. 02-6
Decisions of the Universal Service)	
Administrator)	
)	
The School for Integrated Academics and)	File No. SLD-536126(FY2006)
Technologies, Inc. ("SIATech"))	
)	
New Education for the Workplace, Inc.)	File No. SLD-536824, SLD-537090,
("NEWCorp"))	SLD-537176, SLD-537265(FY2006)

To: The Commission

CONSOLIDATED REQUEST FOR REVIEW

Trillion Partners, Inc. ("Trillion"), through counsel and pursuant to Section 54.719(c) of the Federal Communication Commission's ("Commission") rules, submits this Consolidated Request for Review seeking reversal of five funding decisions made by the Schools and Libraries Division of the Universal Service Administrative Company ("USAC" or "Administrator"), denying one funding request for SIATech³ and four funding requests for NEWCorp⁴ for FY 2006 (collectively, the "Applications"). These appeals are consolidated because they involve similar parties and similar facts.

³ Administrative Record ("AR") at 1 (USAC Funding Commitment Report attached to Funding Commitment Decision Letter for SIATech dated Jan. 30, 2007).

⁴ AR00002-5 (USAC Funding Commitment Reports attached to Funding Commitment Decision Letter for NEWCorp dated Feb. 21, 2007).

Trillion's appeal is timely. Section 54.720(b) of the Commission's rules requires the filing of an appeal "within sixty (60) days of issuance" of a decision by USAC. The SIATech denial was made on January 30, 2007, and 60 days thereafter is April 1, 2007. Because April 1 falls on a Sunday, a holiday under the Commission's rules, the appeal must be filed no later than Monday, April 2, 2007.⁵ All four NEWCorp USAC denials are dated February 21, 2007, and those appeals must be filed no later than April 23, 2007. Because this appeal is being filed before the earliest of the appeal due dates, the appeal is timely filed.⁶

I. STATEMENT OF TRILLION'S INTEREST IN THIS CONSOLIDATED REQUEST FOR REVIEW

Trillion has standing to file this appeal because Section 54.719(c) of the Commission's rules provides that, "[a]ny person aggrieved by an action taken by a division of the Administrator ... may seek review from the Federal Communications Commission."⁷ In this case, Trillion is directly aggrieved by USAC's denial of funding because Trillion executed legally binding contracts on the allowable contract date with SIATech and NEWCorp (collectively, the "Schools") to provide Internet access services in connection with the Applications.

Trillion brings this request to the FCC instead of USAC for decision because: (1) this issue pertains to a well-established Commission rule that the applicant shall not sign a contract before the 28-day Form 470 posting period has expired;⁸ (2) it is unclear whether USAC rules allow USAC to consider additional contemporaneous evidence under the facts applicable in this

⁵ 47 C.F.R. § 1.4(j).

⁶ 47 C.F.R. § 54.723 ("The Wireline Competition Bureau shall conduct *de novo* review of request for review of decisions issue[d] by the Administrator.") (emphasis in original).

⁷ 47 C.F.R. § 54.719(c).

⁸ 47 C.F.R. § 54.504(b)(4); *see Schools and Libraries Universal Service Support Mechanism, Fifth Report and Order* and *Order*, 19 FCC Rcd 15808, 15816 ¶9 (2004) ("*Fifth Report and Order*").

case, and (3) Trillion seeks relief *in the alternative* that cannot be provided by USAC, namely, a waiver of USAC's procedural rules regarding the provision of additional information and/or the 28-day posting period.

11. INTRODUCTION

This is a case of a simple mistake made by a dedicated school official who is new to the complex requirements of the E-rate Program.⁹ Significantly, this mistake was made following the departure of the Schools' E-rate employee. Specifically, this official, the Schools' IT Director, received two copies of five contracts executed by Trillion on February 16, 2006. He signed one set and gave it to his Administrative Director, who forwarded it to Trillion. This is the "official set" of contracts, all of which are properly dated February 16, 2006. The IT Director mistakenly hand-dated his "copy set" as February 15, 2006, and kept ~~them~~ in his files. This is the copy he forwarded to the Program Integrity Assurance ("PIA") reviewer at USAC. To exacerbate this problem, the IT Director incorrectly defended the incorrect date in communications with USAC. Therefore, USAC denied the applications on the grounds that contracts were signed on the day of expiration of the 28-day posting period, February 15, 2006.¹⁰ However, as presented in this appeal, the overwhelming contemporaneous evidence shows that the parties executed the contracts one day later on the allowable contract date, February 16,

⁹ In today's technology environment where copies of multiple contracts are being transmitted via facsimile and e-mail in multiple formats, these types of clerical errors can easily and frequently occur, as is the case here.

¹⁰ If the Commission opens the Form 471 Filing Window as late as December and closes it in mid-February, the current 28-day posting period rule forces applicants who post the Form 470 after the holiday to consider bids, weight and score bids, seek Board approval (where applicable), choose providers, and execute contracts at the eleventh hour to meet the Form 471 posting requirement. Instead, the Commission should establish a meaningful time period to allow the applicants to finalize the competitive bid process. One way of doing this would be for the Commission to close the 28-day posting period in advance of USAC's official close of the FCC Form 471 Filing Window.

2006, and, therefore, satisfied the 28-day posting period. Trillion submits that this case is substantially similar to the facts in the recent *Richmond County* Order, discussed below, in which the Commission granted the Request for Review when the petitioner submitted the correct versions of the service provider contracts on appeal.’’

In addition to the legal arguments set forth below, strong public policy considerations support Trillion’s request for the Commission to consider the additional information. For example, these are public charter high schools in need of E-rate funding that, but for a clerical error, they would have received. Moreover, the 28-day posting period rule is designed to promote fair and open competition. Because the parties executed the contracts on February 16, 2006, they complied with the 28-day posting period. However, if the Commission decides that the additional information is too late, Trillion respectfully submits that there would be no harm to fair and open competition because Trillion was the only bidder on the contracts, and there would have been only one day left in the posting period. Therefore, Trillion requests a limited waiver of USAC’s procedures.

III. STATEMENT OF FACTS¹²

A. The Parties.

SIATech, Inc. is a public charter high school group with 15 campuses nationwide. The SIATech schools re-engage disconnected students through an innovative curriculum that integrates technology with academics and provides the opportunity to earn a high school diploma. Between 1998 and 2006, more than 5,500 students (all previously designated as

¹¹ *Requests for Review by Richmond County School District*, 21 FCC Rcd 6570 (2006).

¹² All of the facts set forth in the “Statement of Facts” section of this Consolidated Request for Review have been attested to, under penalty of perjury, by Trillion’s in-house legal counsel, Trillion’s founding President and CEO, and the Schools’ IT Director. AR00006 (Declaration of Mr. Smyth), AR00007 (Declaration of Mr. Poth) and AR00008 (Declaration of Mr. Halfaker).

“dropouts”) have earned an accredited high school diploma from SIATech’s innovative program. SIATech’s Application covers seven campuses in California.

NEWCorp is a nonprofit corporation that provides curriculum and administrative services to charter schools in partnership with SIATech. NEWCorp provides services to SIATech schools that are located outside of the state of California. Eight of the SIATech school’s campuses applied for E-rate funding as part of a NEWCorp Consortium. NEWCorp is a SIATech subsidiary, and the organizations share employees and administrative offices.

Trillion provides E-rate eligible, secure broadband services to the educational market. They are a service provider of fixed licensed wireless and fiber WANs for K-12 school districts in the United States, serving hundreds of school districts and over 1,500 schools.

B. The Allowable Contract Date.

1. SIATech’s Allowable Contract Date.

On January 10, 2006, SIATech posted an FCC Form 470 seeking telecommunications, Internet access, internal connections, and basic maintenance services.¹³ The allowable contract date was February 7, 2006.¹⁴ Shortly thereafter, having realized that the first Form 470 did not include specific language for a broadband wide area network, on January 19, 2006, SIATech posted a second Form 470 for the purpose of including these services in its RFP in the telecommunications and Internet access services categories.¹⁵ On January 19, 2006, SIATech

¹³ AR00009-17 (FCC Form 470 Application Number 924900000574398, hereinafter, “SIATech Jan. 10th Form 470”).

¹⁴ *Id.* at AR00009.

¹⁵ AR000 18-25 (FCC Form 470 Application Number 924900000581298, hereinafter, “SIATech Jan. 19th Form 470”).

also made available a new Request for Proposal (“RFP”).¹⁶ The allowable contract date for the second Form 470 was February 16, 2006.¹⁷

2. NEWCorp’s Allowable Contract Date.

On January 11, 2006, NEWCorp posted an FCC Form 470 seeking telecommunications, Internet access, internal connections, and basic maintenance services.¹⁸ The allowable contract date was February 8, 2006.¹⁹ Shortly thereafter, having realized that the first Form 470 did not include specific language for a broadband wide area network, on January 19, 2006, NEWCorp posted a second Form 470 for the purpose of including these services in its RFP in the telecommunications and Internet access services categories.²⁰ On January 19, 2006, NEWCorp also made available a new Request for Proposal (“RFP”).²¹ The allowable contract date for the second Form 470 was February 16, 2006.²²

C. The February 16, 2006 Contracts.

Trillion was the **only** service provider to bid on the SIATech and NEWCorp contracts to provide Internet access services. After the 28-day posting period, on February 16, 2006, SIATech and NEWCorp selected Trillion as the winning bidder. On that same date, the IT Director received two copies of the contracts for SIATech and NEWCorp that were already

¹⁶ AR00026-32 (SIATech RFP).

¹⁷ AR00018 (SIATech Jan. 19th Form 470).

¹⁸ AR00033-40 (FCC Form 470 Application Number 667920000573056, hereinafter, “NEWCorp Jan. 11th Form 470”).

¹⁹ *Id.* at AR00033.

²⁰ AR00041-48 (FCC Form 470 Application Number 432520000581348, hereinafter, “NEWCorp Jan. 19th Form 470”).

²¹ AR00049-55 (NEWCorp RFP).

²² AR00041 (NEWCorp Jan. 19th Form 470).

executed and dated February 16, 2006, by Trillion. He signed one set of contracts and gave them to his Administrative Director, who forwarded them to Trillion. This set of contracts constitutes the legally binding contracts in this appeal.²³ The IT Director, however, then hand-dated his second copy with the mistaken date of February 15, 2006 and kept that set in his files. This second set of contracts was provided to USAC. The Schools also met the Form 471 Filing Window Deadline by filing their completed and certified FCC Form 471s on the same date as signing the contracts, February 16, 2006.²⁴

Also on February 16, 2006, the Schools and Trillion exchanged the following correspondence with Trillion's legal counsel regarding the execution of the contracts:

- At 1:07 p.m., Mr. Smyth, Trillion's in-house legal counsel sent an e-mail to Ms. Range, the Administrative Director of SIATech: "Have you sent the signature pages? I just wanted to make sure they didn't get blocked by some size limit **anywhere**."²⁵
- At 3:51 p.m., Ms. Range sent Mr. Smyth an e-mail stating, "Here are all the signature pages broken out by state. Let me know if you will scan them back to me or be faxing them. Our fax machine is in a different **suite**."²⁶
- At 4:20 p.m., Mr. Smyth informs Ms. Hahn of Trillion that "I have already saved these in the SiaTech Legal folder."²⁷

²³ SIATech Legally Binding Contract dated Feb. 16, 2006 (FRN 1483818) at AR00056-59; NEWCorp Legally Binding Contract (AZ) dated Feb. 16, 2006 (FRN 1485668) at AR00060-62; NEWCorp Legally Binding Contract (FL) dated Feb. 16, 2006 (FRN 1486990) at AR00063-65; NEWCorp Legally Binding Contract (GA) dated Feb. 16, 2006 (FRN 1487203) at AROOO66-68; and NEWCorp Legally Binding Contract (NM) dated Feb. 16, 2006 (FRN 1486706) at AROOO69-71. The pertinent pages of each contract (the first page, governing law section and signature page) have been included. The contract amounts have been redacted.

²⁴ AROOO72-77 (FCC Form 471 App. 536126 SIATech); AROOO78-83 (FCC Form 471 App. 536824 NEWCorp FL); AR00084-89 (FCC Form 471 App. 537176 NEWCorp AZ); AR00090-95 (FCC Form 471 App. 537265 NEWCorp GA); and AROOO96-101 (FCC Form 471 App. 537090 NEWCorp NM).

²⁵ AR00102 (E-mail dated Feb. 16, 2006 at 1:07 p.m. from Mr. Smyth to Ms. Range).

²⁶ *Id.* (E-mail dated Feb. 16, 2006 at 3:51 p.m. from Ms. Range to Mr. Smyth).

²⁷ *Id.* (E-mail dated Feb. 16, 2006 at 4:20 p.m. from Mr. Smyth to Ms. Hahn).

- At 8:02 p.m., Mr. Smyth sent an e-mail to Ms. Range stating “attached please find the fully executed signature pages.”²⁸

The 8:02 p.m. e-mail from Trillion’s in-house counsel to the Schools’ Administrative Director attached scanned copies of fully-executed signature pages for one SIATech and four NEWCorp contracts dated February 16, 2006 by all parties.²⁹ Trillion’s legal counsel retained the original fully-executed contracts in its files. In addition, on March 6, 2006, Trillion sent a standard “Welcome Letter” to the Schools that again included the same copies of the executed signature pages for each contract.³⁰

Significantly, in the months immediately prior to the events that give rise to this appeal, the Schools’ most knowledgeable and experienced E-rate employee resigned, leaving the Schools short-staffed and with little experience in navigating the unique and complex requirements of the E-rate Program.

D. Communications with USAC.

1. NEWCorp’s Communications with USAC.

On October 6, 2006, the IT Director responded to a September 20, 2006, PIA inquiry.³¹ Specifically, the PIA Reviewer noted the Schools provided undated and unsigned copies of the contracts, and requested signed and dated NEWCorp contracts for all four FCC Form 471 applications.³² In response, the IT Director incorrectly provided his copy set of contracts for

²⁸ AR00103-09 (E-mail dated Feb. 16, 2006 at 8:02 p.m., from Mr. Smyth to Ms. Range).

²⁹ *Id.*

³⁰ *See* AR00110-17 (Welcome Letter from Trillion to the Schools dated Mar. 6, 2006).

³¹ AR00118-27 (NEWCorp Memorandum dated Oct. 6, 2006 from Mr. Halfaker to Mr. Jarrett at USAC responding to Mr. Jarrett’s Sept. 20, 2006 contract related request for additional information and attaching a copy set of contracts.).

³² *Id.*

NEWCorp rather than the officially executed set that Trillion sent to the Schools' Administrative Director (Angela Range) by e-mail on February 16, 2006, and by Welcome Letter, dated March 6, 2006.³³

2. SIATech's Communications with USAC.

On December 5, 2006, a PIA reviewer requested a copy of the SIATech contract.³⁴ In response, the IT Director mistakenly provided the SLD with the SIATech contract from his copy set, rather than the legally binding contract dated by both parties on February 16, 2006.³⁵ Again, the official copy of the SIATech contract was in the Schools' Administrative Director's files.

E. USAC's Denials.

On January 30, 2007, USAC issued a Funding Commitment Decision Letter ("FCDL") to SIATech and Trillion denying SIATech's funding because "[a] contract for a new service was signed prior to the required 28-day waiting period computed from the date of the posting of the Form 470 to the SLD Web Site."³⁶ On February 21, 2007, USAC issued an FCDL to NEWCorp

³³ AR00103-09 (E-mail from Mr. Smyth to Ms. Range dated Feb. 16, 2006 at 8:02 p.m.) and AR00110-17 (Welcome Letter dated Mar. 6, 2006).

³⁴ AROO128-29 (E-mail from Mr. Celantano (SLD) to Mr. Halfaker dated Dec. 5, 2006 at 10:40 a.m.).

³⁵ *Id.* at 128-32 (E-mail from Halfaker to Mr. Celantano dated Dec. 5, 2006 at 1:42 p.m.) (Only the pertinent contract pages are attached and contract amount information has been redacted.). Mr. Halfaker attempted to explain the contract date as follows: "I am a bit confused by this request, as the effective date on the contract is 2/16/06 which matches the Allowable Contract Date on the form 470. If you review the contract language and definitions, you will see that the 'Effective Date' on the contract is the date upon which it becomes 'binding and enforceable. You will also note on the signature pages that the Effective Date is clearly marked as being 2/16/06." However, Mr. Halfaker was not aware that the February 15th date was incorrect or that the Administrative Director had the official set of contracts, correctly dated February 16th, in her files.

³⁶ AR00001 (USAC Funding Commitment Report attached to FCDL for SIATech dated Jan. 30, 2007).

and Trillion denying NEWCorp's four funding requests because "[t]he referenced RFP was not available for 28 days after the filing of the Form 470."³⁷

IV. ARGUMENT

The Commission should accept the additional evidence in the spirit of the E-rate Program and Commission Orders, because the Schools did not violate section 54.504(b)(4) of the Commission's rules; USAC's basis for denial was based on a clerical error and there was no harm to the competitive process. In the alternative, if the Commission refuses to consider the additional information, Trillion requests that the Commission exercise its authority to waive USAC's procedures based on the public interest involved and the good cause demonstrated through this appeal.

A. The Commission Should Grant this Appeal Because the Schools Complied with the 28-Day Posting Period and Competitive Bidding Requirements.

The Commission should grant this Consolidated Request for Review because the Schools complied with the 28-day posting period, a core program requirement, and there was no harm to the competitive bidding process. To be sure, USAC's Appeals Guidelines state that, "USAC will not accept new information on appeal that is inconsistent with information in the file used during review."³⁸ However, Section 54.723(a) of the Commission's rules states that the Wireline Competition Bureau's standard of review of a USAC denial is *de novo*. In addition, Section 54.721, "General filing requirements," of the Commission's rules states that the Request for Review must contain a "full statement of relevant, material facts with supporting affidavits *and*

³⁷ AR00002-5 (USAC Funding Commitment Reports attached to FCDL for NEWCorp dated Feb. 21, 2007).

³⁸ The Appeals Guidelines are posted on USAC's website. The link to USAC's Appeals Guidelines is: <http://www.universalservice.org/sl/about/appeals/appeals-guidelines.aspx>.

documentation.”³⁹ Moreover, the Commission routinely considers new information on appeal, particularly in situations like this involving the date on which a contract is signed. For example, in the *Richmond County* Order, the Commission allowed the petitioner to submit the correctly dated versions of the relevant contracts on appeal, as well as additional evidence pertaining to the contract dates.⁴⁰ Similarly, in the *Gayville-Volin* Order, the FCC allowed contemporaneous school board minutes to be provided on appeal to prove that the E-rate contract was signed on the date printed above the contract signature lines: “Based on the evidence submitted on appeal, we find that Gayville-Volin had a legally binding agreement in place when submitting its FCC Form 471.”⁴¹ As discussed below, the official set of contracts attached to this appeal prove that the Schools complied with Section 54.504(b)(4) of the Commission rules.

In this case, the Commission has three reasons to make a finding that the contracts were executed on the allowable contract date: (1) contemporaneous evidence demonstrates that the Schools and Trillion entered into legally binding contracts on the allowable contract date and that the basis for USAC’s denial was created by a clerical error made following the departure of the Schools’ E-rate employee; (2) under Texas law, the contracts are considered “executed” on the date that the parties sign the agreement; and (3) there has been no harm to the competitive bidding process because the parties satisfied the 28-day posting period, and Trillion was the only bidder. Each point is addressed below:

³⁹ 47 C.F.R. § 54.721(b)(2) (emphasis added).

⁴⁰ *Requests for Review by Richmond County School District*, 21 FCC Rcd 6570 (2006); *see also Requests for Review by Approach Learning and Assessment Center, et al.*, Order, File Nos. SLD-140957, et al., DA-07-1332 (rel. Mar. 23, 2007) (allowing new information on appeal).

⁴¹ *Request for Review of a Decision of the Universal Service Administrator by Gayville-Volin School District 63-1*, 21 FCC Rcd 9274, 9276 ¶¶ 4-5 (2006); *see also Bancroft Rosalie Community Schools*, 15 FCC Rcd 20406, 20409 76 (2000) (The FCC stated that it considered the additional information supplied in the appeal but nevertheless concluded that Bancroft is not entitled to **any** relief.).

1. USAC's Denials are Based on a Clerical Error.

The Commission should make a finding that the parties executed the contracts on the allowable contract date. Step 4 of USAC's contract guidance procedures states that an applicant "must wait at least 28 days after the posting of the *Description of Services Requested and Certification Form* (Form 470) on USAC's website before executing any contracts, selecting a service provider, or signing and submitting the *Services Ordered and Certification Form* (Form 471)."⁴² In this case, the parties complied with this rule by signing the contracts on February 16, 2006. We are before the Commission on this appeal because, through an inadvertent, clerical and technical error, the Schools' IT Director provided the unofficial "copy set" of contracts to USAC.

Through this appeal, Trillion proffers at least three items of contemporaneous evidence proving that the parties signed the contracts on February 16, 2006:

- The original, signed contracts dated February 16, 2006 by all parties;
- The February 16, 2006 e-mail exchange between the parties demonstrating that the signature pages had been executed and exchanged on February 16, 2006, the allowable contract date;

⁴² Step 4: 28-Day Waiting Period, <http://www.usac.org/sl/applicants/step04/28-day-waiting-period.aspx> (last visited Mar. 29, 2007) (emphasis in original); *See Fifth Report and Order* at 15816721 ("[I]t is appropriate to recover the full amount of funds of disbursed for a funding request when the beneficiary signs a contract before the end of the 28-day posting period."). Note that USAC uses the term "28-day waiting period" and the Commission uses the term "28-day posting period." These terms refer to the same 28-day requirement.

- e The February 16,2006 e-mail from Trillion’s legal counsel forwarding a copy of all executed signature pages for each contract on February 16, 2006; and
- e The March 6,2006 Welcome Letter, including copies of the original signature pages of the signed February 16,2006 contracts.

In addition, the Schools and Trillion proffer the declarations, under penalty of perjury, of Trillion’s founding President and CEO, Trillion’s in-house legal counsel, and the Schools’ IT Director.

The IT Director’s well-intentioned actions are understandable here, particularly where the Schools’ E-rate expert had resigned, and the five contracts at issue were signed and delivered by scanning and e-mails. Under this set of facts, Trillion urges the Commission to excuse the clerical error, and grant this appeal.

2. Under Texas Law, Even the Erroneous Duplicate Contracts are Considered to be Executed on February 16, not February 15,2006.

As a matter of law, the contracts were executed on February 16,2006. The contracts at issue in this appeal stipulate that they will be governed under Texas law.⁴³ Under Texas law, a contract is executed when it is signed.⁴⁴ Thus, even if the IT Director wrote the wrong date (February 15) on his copy set of contracts, that does not change the fact that the parties signed,

⁴³ AR00057 (SIATech Legally Binding Contract Section 8.1 Governing Law and Jurisdiction); AR00061 (NEWCorp (AZ) Legally Binding Contract Section 8.1 Governing Law and Jurisdiction); AR00064 (NEWCorp (FL) Legally Binding Contract Section 8.1 Governing Law and Jurisdiction); AR00067 (NEWCorp (GA) Legally Binding Contract Section 8.1 Governing Law and Jurisdiction); and AR00070 (NEWCorp (NM) Legally Binding Contract Section 8.1 Governing Law and Jurisdiction).

⁴⁴ *Sun Jacinto Co. v. Nunn*, 203 S.W.3d 905,909-10 (Tex. App. 2006) (“Based upon the common usage of ‘executed’ as reflected by Black’s and Webster’s, we hold that ‘executed,’ as commonly used in the context of a written contract signed by the parties, means the date the contract is signed.”); *see also* Black’s Law Dictionary (8th ed. 2004) at 609 (defining “execute” to mean, “3. To make (a legal document) valid by signing”).

and therefore executed, the contracts on February 16, the allowable contract date. In this case, contemporaneous evidence proves that the parties signed the contracts on February 16, 2006:

- e The official contracts reference February 16, 2006 as the date of signing.
- e The February 16, 2006 e-mail exchange between the parties demonstrating that the signature pages had been executed and exchanged on February 16, 2006, the allowable contract date.
- e The February 16, 2006 e-mail from Trillion's legal counsel forwarding a copy of all executed signature pages for each contract on February 16, 2006, and
- e The March 6, 2006 Welcome Letter, including copies of the original signature pages of the signed February 16, 2006 contracts.

Indeed, the overwhelming contemporaneous evidence proves that the parties signed the contracts on February 16. Therefore, under Texas law, the parties "executed" the contracts on February 16, which complies with the terms of Commission's 28-day posting period.

Based on the above, and consistent with the *Bishop Perry* Order, the Commission should not elevate form over substance by holding that the IT Director's well-intentioned actions foreclose the Schools from receiving this much-needed funding.

3. There is No Harm to Fair and Open Competition.

The competitive process has not been harmed because: (1) as a matter of fact and law, the contracts were executed on the allowable date; and (2) even if the Commission considers February 15 to be the date of execution, Trillion was the only bidder and, therefore, other bidders were not deprived of a meaningful competition. The Commission's intent in requiring the applicants to wait 28 days before entering into a contract for services or choosing a service provider was to provide for a fair and open competitive bid process.⁴⁵ In this case, that intent has

⁴⁵ *Fifth Report and Order* at 15816 ¶21 ("the competitive bidding process is a key component of the schools and libraries program").

been served, regardless of the Schools' later mistakes with respect to the dates on the contracts and communications with USAC. To hold otherwise would elevate form over substance and deprive these charter schools of much needed funding.

B. In the Alternative, Trillion Seeks a Limited Waiver of USAC's Procedures.

The Commission should waive USAC's procedures, because there is no evidence of waste, fraud, or abuse, or failure to comply with the core program requirements, and the Schools complied with the competitive bidding process. The mistake at the heart of this appeal is a clerical error and, thus, a limited waiver would be in the public interest.

The Commission's rules allow waiver of a Commission rule "for good cause shown."⁴⁶ The Commission has extended this waiver authority to limited waivers of USAC rules. For example, in the *Bishop Perry* Order, the Commission noted that it "has vested in USAC the responsibility of administering the application process for the schools and libraries universal service support mechanism."⁴⁷ Pursuant to that authority, USAC developed procedures relating to the application and appeals process.⁴⁸ Thus, in *Bishop Perry*, the Commission applied the 47 C.F.R. § 1.3 waiver rule to allow a limited waiver of USAC procedures.⁴⁹

⁴⁶ 47 C.F.R. § 1.3.

⁴⁷ *Request for Review of Decision by the Universal Service Administrator by Bishop Perry Middle School*, 21 FCC Rcd 5316, 5618 ¶4 (2006).

⁴⁸ The *Bishop Perry* Order dealt with USAC application procedures known as "minimum processing standards." *Id.*

⁴⁹ *Id.*

The FCC has established the following guidance for determining whether waiver is appropriate:

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.

Requests for Review by Richmond County School District, 21 FCC Rcd 6570,6572 ¶5 (2006) (internal references omitted) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153,1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972)).

In this case, USAC has developed “Appeals Guidelines” that state, in relevant part:

Consistent with these guidelines, USAC will not accept new information on appeal that is inconsistent with information in the file used during review. If, for example, an incorrect contract award date was entered in Block 5 of the Form 471 resulting in a denial for failure to meet competitive bidding requirements and no other information on the contract award date was provided with the application or to PIA during review, USAC will not accept a dated copy of the contract provided with the appeal as the basis for granting the appeal.”

Should the Commission decide not to accept the additional, contemporaneous evidence demonstrating that the parties complied with the FCC’s competitive bidding procedures, Trillion respectfully requests a limited waiver of USAC’s Appeals Guidelines.⁵¹

Such a waiver would be consistent with past Commission precedent related to E-rate funding and clerical errors. In *Bishop Perry*, the FCC granted 196 appeals of decisions denying

⁵⁰ The link to USAC’s Appeals Guidelines is: <http://www.universalservice.org/sYabout/appeals/appeals-guidelines.aspx> (last visited Mar. 29,2007).

⁵¹ To the extent that USAC’s administrative procedures impose deadlines for the provision of additional information when requested by USAC, Trillion requests a limited waiver from those procedures as well in order to make any relief granted by this appeal effective.

funding due to “clerical or ministerial errors in the application.”⁵² In that case, the FCC found good cause to waive the minimum processing standards established by USAC, finding that “rigid compliance with the application procedures does not further the purposes of section 254(h) or serve the public interest.”⁵³ Many of the appeals in *Bishop Perry* involved staff mistakes or mistakes made as a result of staff not being available.⁵⁴ The Commission granted the waivers for good cause, noting that:

[T]he primary jobs of most of the people filling out these forms include school administrators, technology coordinators and teachers, as opposed to positions dedicated to pursuing federal grants, especially in small school districts. Even when a school official has learned how to correctly navigate the application process, unexpected illnesses or other family emergencies can result in the only official who knows the process being unavailable to complete the application on time. Given that the violation at issue is procedural, not substantive, we find that the complete rejection of each of these applications is not warranted. Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we find that denial of funding in these cases would inflict undue hardship on the applicants.⁵⁵

The Commission directed USAC to allow applicants the opportunity to fix ministerial and clerical errors and concluded that such an opportunity would “improve the efficiency and effectiveness of the Fund.”⁵⁶ The Schools clearly fall into the same category, due to the fact that their E-rate employee resigned months before this situation arose leaving a new IT Director to

⁵² *Request for Review of Decision by the Universal Service Administrator by Bishop Perry Middle School*, 21 FCC Rcd 5316 ¶1 (2006).

⁵³ *Id.* at 5321 ¶11. The Commission departed from prior Commission precedent, noting that the departure was, “warranted and in the public interest.” *Bishop Perry* at 5319 ¶9. The Commission noted that many of the rules at issue were procedural, and that a waiver is consistent with the purposes of Section 254, which directs the Commission to “enhance ... access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries.” *Id.*

⁵⁴ *Id.* at 5322 ¶13.

⁵⁵ *Id.* at 5323 ¶14.

⁵⁶ *Id.* at 5327 ¶23.

navigate the E-rate Program. Moreover, the overwhelming contemporaneous evidence proves that the parties executed the contracts on the allowable contract date. Thus, the error in this case was procedural, not substantive, and there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements.

Similarly, in the *Richmond County* Order, Richmond County provided an unsigned and undated contract to USAC during selective review.⁵⁷ On appeal, Richmond County submitted the correctly-dated contract, without any explanation for the difference between the contract submitted to USAC and the contract submitted to the Commission.⁵⁸ The Commission granted a waiver, noting that there was no information to call into question the authenticity of the contract attached to the appeal.⁵⁹ The same is true in this case: there is no information to question the authenticity of the official set of contracts. Specifically, the February 16, 2006 e-mail and March 6, 2006 Welcome Letter attach the electronic version of the signature pages of the official contracts, both sent long before this appeal process.

Most recently, in *Adams County*, the Commission granted 72 appeals where USAC denied funding “either because [the Petitioners] did not have a legally binding agreement in place when their FCC Form 471 application was submitted or because their contract expired

⁵⁷ *Requests for Review by Richmond County School District*, 21 FCC Rcd at 6572 ¶¶4, 6.

⁵⁸ *Id.* at 6572 76.

⁵⁹ *Id.* Also in *Richmond County*, the petitioner admitted that another contract at issue in the case was signed after the FCC Form 471 certification date, but that it was an “inadvertent clerical error” as it intended to sign on the certification date. There, the Commission granted a waiver, finding that although there was a technical violation of its rules, denial of “funding would create undue hardship and prevent it from receiving E-Rate funding.” *Id.* at 6573 77; *see also, Request for Review and/or Waiver of the Universal Service Administrator by Glendale Unified School District*, 21 FCC Rcd 1040 (2006) (granting waiver of its rules when the wrong service start date was inadvertently included on its FCC Form 486).

before the end of the funding year.”⁶⁰ The Commission found that even though some of the Petitioners “missed the program deadline for having a written contract in place, they were adhering to local or state procurement laws.”⁶¹ Still others “were denied needed funding because of ministerial mistakes” or due to employee error.⁶² In one instance, the Commission found that one of the school districts “submitted the wrong contract to USAC, making it appear as though its FCC Form 471 was submitted before its contract was signed.”⁶³ The Commission dismissed this mistake in finding that the school district “had legally binding contracts in place during the relevant funding years.”⁶⁴ In fact, the Commission ruled that such “mistakes do not warrant the complete rejection of th[e] Petitioners’ applications for E-rate funding,”⁶⁵ because they do not involve a misuse of funds and “there is no evidence in the record that the [schools] engaged in activity to defraud or abuse the E-rate program.”⁶⁶

The facts of this case are similar, if not identical, to the type of mistakes and clerical errors related to legally binding contracts that the Commission found forgivable in *Adams County*. First, the IT Director in this case has admitted to inadvertent, clerical error in this consolidated appeal by acknowledging that he submitted the wrong contract to USAC. The contemporaneous evidence on appeal demonstrates that the Schools and Trillion had a legally

⁶⁰ *Requests for Waiver of the Decision of the Universal Service Administrator by Adams County School District I4 Commerce City, Colorado, et al., Order, File Nos. SLD-425151, 425211, 425303, 425352, 426285, et al., FCC 07-35, ¶7 (rel. Mar. 28, 2007).*

⁶¹ *Id.*, ¶9.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*, ¶10.

⁶⁶ *Id.*, ¶12.

binding contracts executed on the allowable contract date that also adhered to Texas State contract law. Finally, because there is not one scintilla of evidence that the Schools or Trillion engaged in any activity that involved a misuse of funds or abuse of E-rate program rules, the Commission should apply its ruling in *Adams County* with equal weight and force to the facts outlined in this consolidated appeal.

In addition, the Commission recently granted an additional 44 applicant waivers of the Form 471 filing window deadline because a grant would “better ensure that universal service support is distributed first to the applicants who are determined by our rules to be most in need, and thus, further the goals of section 254.”⁶⁷ A similar goal would be advanced by granting a limited waiver of USAC’s procedures. Finally, because no other entity bid to provide the services at issue, the underlying purpose of the rule to protect fair and open competition would not be served by strict enforcement.

Thus, in the spirit of the *Bishop Perry, Richmond County, Adams County* and *Approach Learning* Orders, the Commission should grant this consolidated appeal. Trillion has demonstrated good cause for a limited waiver of USAC’s procedures: the mistakes made with respect to the incorrect signature pages were clerical, inadvertent, and resulted in part from the unexpected departure of the Schools’ E-rate employee; there is no evidence of waste, fraud, or abuse, **and** the Schools complied with core program requirements; there has been no harm to fair and open competition; and the public interest would be served by providing much-needed E-rate funding to these public charter **high** schools. Based on the above, Trillion respectfully requests that the Commission waive USAC’s procedures.

⁶⁷ *Requests for Waiver of Decisions by the Universal Service Administrator by Academy for Academic Excellence*, Order, File Nos. SLD-539076, 539722, et al., DA 07-1180, ¶5 (rel. ~~Mar.~~ **9**, 2007).

V. CONCLUSION AND REQUEST FOR RELIEF

Trillion respectfully requests the Commission to grant this consolidated appeal for SIATech's and NEWCorp's FY2006 Applications. For the reasons set forth above, Trillion requests the Commission to make a finding that the Schools and Trillion had a legally binding contract in place on the allowable contract date of February 16, 2006. In the alternative, Trillion requests a waiver of USAC's appeal procedures, to the extent necessary, in order for the Schools to qualify for FY 2006 funding for Internet access. The clerical error that is the basis of the denials is inconsistent with Commission precedent governing clerical errors. Further, Trillion respectfully requests the Commission to remand the applications to USAC with instructions to issue a decision based upon a complete review of the Applications no later than 60 days from the release date of the Commission's order granting this appeal.

Respectfully submitted,

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March 29, 2007

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 29th day of March, 2007, a copy of the foregoing Consolidated Request for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

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